No. 89-1793 (2)

In the Supreme Court of the United States

October Term, 1989

United States of America, *Petitioner*

v.

Thomas M. Gaubert, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Government's petition presents the following issues:

1. Whether this Court should grant certiorari to review an interlocutory order of the Fifth Circuit that remands this case for further proceedings in which the entire suit could be dismissed on grounds not resolved in the interlocutory order.

2. Whether federal regulators of thrift institutions are absolutely immune from tort liability under the "discretionary function" exception to the Federal Tort Claims Act for any and all negligent actions arising out of a regulatory program, including those taken in the day-to-day management of a thrift and which do not call for the exercise of public policy discretion.

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Respondent Thomas M. Gaubert respectfully requests that this Court deny the petition of the United States seeking a writ of certiorari. The Fifth Circuit's decision is an interlocutory order that dismisses one of Gaubert's two claims for lack of standing and remands the other with specific instructions for the district court to resolve an additional standing question which might dispose of the remainder of the case. The government seeks review of what, at this juncture, amounts to a *dictum* discussion by the Fifth Circuit of the "discretionary function" exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

Sec. 2680(a). As such, the petition is premature and asks this Court to render a potentially advisory opinion.

Although the government casts its petition for a writ of certiorari in terms that might be recognized under this Court's rules and precedents -- a conflict among the circuits, a decision contrary to this Court's rulings, a substantial and unsettled question of law -- these are no more than labels pinned on the government's attempt to seek review of an interlocutory discussion which it believes reaches factually infirm conclusions in a unique and complex case.

COUNTER-STATEMENT OF THE CASE

The government's statement of the case attempts to portray the Fifth Circuit's interlocutory order as a final judgment ripe for this Court's review. To the contrary, the Fifth Circuit dismissed one claim for lack of standing and remanded the other for a determination as to whether Gaubert has standing to bring it. Depending on how the further district court proceedings unfold, the Fifth Circuit's entire interlocutory discussion of the discretionary function exception may remain *dictum*.

The government's statement also omits material facts and creates the impression that this case is no different from the now common situation in which federal regulators supervise a failing thrift. This is clearly not the case: the original complaint (and the remaining claim on remand) alleges that federal regulators negligently conducted the *day-to-day management* of Gaubert's then healthy savings and loan. Additionally, the government's statement glosses over the Fifth Circuit's interlocutory observation that once federal regulators assume the management of a thrift's assets, they must use due care. Finally, the government's

statement refers to matters not alleged in the complaint and not part of the record before this Court.[1]

I. Factual Background

This case was before the Fifth Circuit on appeal from the district court's order dismissing Gaubert's amended complaint. Accordingly, this Court -- as the ones below -- must accept the facts alleged as true. *Gibbs v. Buck*, 307 U.S. 66 (1939).

A. Healthy Condition Of Thrift Before FHLBB Actions

In 1983, Gaubert acquired what became Independent American Savings Association ("IASA"). Amended

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[1] Throughout its statement of facts, the government cites to various materials outside the complaint, including the administrative record before the agencies at the time the regulators placed IASA in receivership. Neither the district court nor the Fifth Circuit relied on or referred to these materials. Moreover, the government often cites to only parts of these materials without including them in the record for the Court to review.

The government justifies use of these extraneous materials on the ground that they are "background materials" "challeng[ing] the substance of the jurisdictional allegations." *Petition for a Writ of Certiorari* ("Pet.") at 5 n.3 (*quoting* 5 C.Wright & A.Miller, *Federal Practice and Procedure* Sec. 1350, at 549 (1969)). Contrary to this explanation, it is obvious that the government really is using its own record material to challenge numerous factual allegations in the complaint despite this case being at the pleadings stage. For example, the government contests the complaint's assertion that the "neutralization agreement" in this case was unprecedented -- a matter obviously irrelevant to subject matter jurisdiction. The fact that the government finds itself compelled to dispute Gaubert's factual allegations in an effort to persuade this Court to take this case at the pleading stage confirms that a writ of certiorari is premature until the true facts are established in the proceedings below.

Complaint ("Compl.") at 6.[2] Federal and state regulators conducted independent audits and examinations which confirmed that, through the end of 1984, IASA's assets and net worth grew steadily and the thrift was financially sound. *Id.* at 8. Specifically, in December 1984, when Gaubert left the thrift, IASA had reported, without comment or dissent from the federal regulators, a net worth of at least $54 million. As late as 1985, before the regulators acquired control of its management, the thrift was financially sound and experiencing healthy growth. *Id.* at 9.

B. Investex Merger And The "Neutralization" Agreements

In 1984, the Federal Home Loan Bank Board ("FHLBB") and Federal Savings and Loan Insurance Corporation ("FSLIC") officials were looking for a merger candidate for Investex Savings, a failing Texas thrift. *Id.* at 16. During negotiations with Gaubert to acquire Investex, these officials became aware of questions concerning Gaubert's role as a borrower at an Iowa thrift. *Id.* at 12. Rather than scuttle the Investex transaction, the regulators pressured Gaubert to sign an unprecedented and never-again used "neutralization agreement." *Id.* at 13. Under the agreement, the Investex merger would proceed and Gaubert would temporarily remove himself from IASA while the FHLBB investigated the Iowa loan. *Id.* at 12. In addition, as part of the merger, Gaubert would contribute capital to IASA in the form of $25 million in personal assets and would guarantee IASA's net worth even though he was prevented from managing its operations. *Id.* at 14, 17. Contrary to the government's assertions first made in its petition, see note 1, *supra*, federal regulators have never

[2] All numbers cited with the Amended Complaint refer to paragraphs.

before -- nor have they since -- required anyone forced to relinquish management to enter into a net worth guarantee. *Id.* at 35. In December 1985, when the investigation of the Iowa loan did not proceed as planned, Gaubert negotiated and signed another agreement to permanently leave IASA and the industry. At the time, IASA was still a healthy thrift with a positive net worth. *Id.* at 35.

C. FHLBB Acquires Control Of IASA Management

Only after the regulators secured Gaubert's December 1985 agreement did they advise him of their desire to take over the management of IASA. Rather than exercising their formal regulatory powers -- issuing a cease and desist order, appointing a conservator for IASA, or imposing a receivership -- the regulators again utilized unprecedented procedures. *Id.* at 23. Through threats and pressure,[3] the regulators forced IASA's duly-elected directors and properly-appointed officers to resign and replaced them with their own hand-picked directors and officers. IASA's new chief executive officer came from the board of the Federal Home Loan Bank of Dallas ("FHLB-Dallas") and its new chief operating officer from one of the offices in the FHLB-D itself. *Id.* at 28. Neither had any experience managing a thrift. *Id.* at 31.

The degree of the regulators' involvement at IASA deepened to the point that they took part in IASA's day-to-day, technical and business management, including: negotiation of the new officer's salary and employment conditions; mediation of salary disputes; selection of financial and other consultants; conversion of IASA from a

[3] The Fifth Circuit observed that "the government euphemistically refers to this ability to pressure S & Ls as 'jawboning.'" *Pet.* at 3a.

state- to a federally-chartered thrift; placement of one of IASA's subsidiaries in bankruptcy; first prohibition and then authorization for IASA to initiate certain litigation; direct participation in decision-making at IASA board meetings; and prevention of state regulatory assistance to IASA. *Id.* at 33, 34. It was this involvement that the Fifth Circuit observed would be outside the discretionary function exception. *Pet.* at 14a.

After being at the helm of IASA for six months, the FHLB-D appointed management announced that IASA's net worth dropped from a positive $54 million to a negative net worth of over $400 million. *Id.* at 36.

II. Proceedings Below

A. District Court. In April 1988, Gaubert brought this tort action, asserting causes of action based on: (1) the regulators' negligent selection of IASA's officers and directors[4] and (2) the regulators' negligent day-to-day management of IASA. As to both claims, Gaubert alleged damages of $100 million -- $75 million for the lost value of his IASA shares and $25 million for loss of the additional capital he contributed to IASA under the guarantee agreement. The government moved to dismiss, arguing first that Gaubert lacked standing "because the alleged causes of action are owned by FSLIC/corporate" and second that Gaubert's claims fell within the "discretionary function" exception and were barred by sovereign immunity. *March 17, 1988 Motion to Dismiss* at 21, 25.

[4] In particular, Gaubert alleged that the federal agencies' negligent actions in forcing him to sign the neutralization agreement, engineering the Investex merger, compelling the resignation of IASA's directors, and handpicking new directors caused IASA's financial ruin.

On September 28, 1988, the district court granted the Government's motion. Electing not to address the government's standing argument, the court held that the actions alleged were encompassed by the discretionary function exception. The court reasoned that because a decision to place IASA in receivership would have fallen within the exception, so too did the federal agencies' decision *not* to place IASA in receivership. *Pet.* at 24a. From this -- without citation to *any* authority -- the court concluded that the federal agencies' negligent day-to-day management of IASA, then a healthy thrift, was "an extension of the Agencies' discretion not to place IASA in receivership in 1984."[5] *Id.* at 25a.

B. Court of Appeals. Contrary to the approach of the district court, the Fifth Circuit disposed of the case on standing grounds. The Fifth Circuit held that Gaubert lacked individual standing to bring suit on his first claim for the diminution in value of IASA shares:

> Gaubert suffered no injury as a result of the neutralization agreement that was not suffered by all of the other IASA shareholders -- the loss of the value of their shares. This being the case, Texas law does not permit Gaubert an individual cause of action.

[5] The court's reasoning flatly contradicts this Court's holding in *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955), that, although the decision to assume operation of a lighthouse fell within the discretionary function exception, the negligent operation of the facility did not. The court's reasoning also failed to account for the fact that if the government had placed IASA in receivership, it would have been liable for the negligent management of IASA's assets. See *FDIC v. Hartford Insurance Co.*, 692 F.Supp. 866 (N.D.Ill. 1988), *vacated on other grounds*, 877 F.2d 590 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 865 (1990).

Pet. at 19a. Accordingly, the court affirmed the dismissal of Gaubert's $75 million stock claim.

The Fifth Circuit remanded Gaubert's $25 million claim -- based on the guarantee agreement -- with instructions that the district court determine Gaubert's standing to bring that claim. The court held:

> Gaubert may have a personal cause of action against FHLBB, FHLB-Dallas, and FSLIC for causing the deterioration of IASA resulting in the loss of his property * * * * Unfortunately, we do not have sufficient information in the record to allow us to pass on whether Gaubert has a cause of action in this regard, as it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negligently cause the deterioration of the corporation.

Pet. at 20a. The Fifth Circuit "therefore remand[ed] Gaubert's action for loss of property valued at $25 million to the district court to determine whether a valid claim is presented." *Id.*[6] The government unsuccessfully sought rehearing, no judge requesting that the court be polled. *Pet.* at 30a.

Going beyond the Fifth Circuit's holding on standing is its thorough discussion of this Court's "discretionary

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[6] While the Fifth Circuit discussed the "discretionary function" exception first and standing second, its holding is clear. Both the introduction to the Fifth Circuit's opinion and the conclusion make clear that "Gaubert's claim for the lost value of his shares is DISMISSED for lack of standing, and his claim for $25 million in lost property is REMANDED for further consideration." *Pet.* at 20a.

function" exception decisions. Rather than ignoring *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984), as the government now contends, the Fifth Circuit acknowledged that the central policy behind the exception is "Congress['s] wish[] to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Pet. at 8a-9a. Citing *Berkovitz v. U.S.*, 486 U.S. 531, 108 S.Ct. 1954 (1988), the court then discussed the "two distinct strands of conduct to which the discretionary function exception does not apply." *Id.* at 11a.

"[F]irst are cases where the official is acting pursuant to statute, and therefore has no real discretion, as her actions are pre-ordained by Congress." *Id.* at 11a-12a. Again citing *Berkovitz, supra*, 108 S. Ct. at 1963, the court noted that the fact that "officials [do] not have regulations telling them at every turn, how to accomplish their goals * * * does not automatically render their decisions discretionary and immune from FTCA suits." Rather, "*[o]nly policy oriented decisions enjoy such immunity.*" *Id.* at 12a (emphasis added) (citations and footnotes omitted). Hence, "the second type of conduct not encompassed by the discretionary function exception are those actions which are taken outside of the strictures of statutory or regulatory mandates," and which are not "policy oriented." *Id.*

The Fifth Circuit then discussed the *Varig/Berkovitz* distinction between non-mandatory actions that are policy-oriented and those that are not in the context of "the factual allegations of Gaubert's complaint to determine at which point the federal officials lost their Sec. 2680(a) immunity." *Id.* at 13a. Carefully weighing the specific facts, it observed that some allegations fell and others survived:

> [T]he decision to merge IASA with Investex and seek a neutralization agreement from Gaubert was a policy oriented decision protected by [sec.] 2680(a). Similarly, the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception.

Pet. at 14a (citations omitted). The court observed further, however, that the federal agencies' actions lost their "policy oriented" character "and thus lost the protection of [sec.] 2680(a)[:]"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in [paras.] 33-43 of the Amended Complaint.

Id. Accordingly, the Fifth Circuit stated that paras. 33-43 of the amended complaint -- those alleging that the agencies assumed IASA's day-to-day management -- would be actionable if Gaubert establishes standing to bring a claim.

REASONS FOR DENYING THE WRIT

I. Supreme Court Review Of The Fifth Circuit's Interlocutory Order Is Premature.

By holding that Gaubert had no individual standing to redress the devaluation of IASA's stock, the Fifth Circuit rendered that portion of its discretionary function discussion relating to the $75 million claim *dictum*. Further, by

remanding the issue of Gaubert's standing to assert a $25 million claim under the guarantee agreement for further fact development, the Fifth Circuit undercut whether any of that discussion will mature into an actual holding.[7] If the district court determines that Gaubert lacks standing to bring his remaining claim, the case is over. Accordingly, the Fifth Circuit's interlocutory discussion of the discretionary function exception will be ripe for review only if the district court resolves the outstanding jurisdictional issues in Gaubert's favor. At this juncture, certiorari is simply premature.

The Government seeks to portray the Fifth Circuit's decision as "interlocutory [only] in that it remands to the district court for further proceedings." *Pet.* at 23 n.14. The Government also contends that the decision otherwise "conclusively resolves the critical issue of the application of the discretionary function exception in this case, by holding that the government's actions do not fit within that exception as a matter of law." *Id.* By specifically instructing the district court to resolve threshold jurisdictional issues that may moot the entire case, however,

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[7] The government's protestations that the Fifth Circuit's opinion creates important precedent requiring immediate Court review contradicts its earlier position. Seeking a rehearing below, the government seemed to agree that the Fifth Circuit's discussion might only be *dicta* depending on what happened on remand:

> It is unclear whether the opinion is stating that plaintiff may have a tort or contract claim * * * for $25 million based upon his guarantee agreement, or whether the Panel is suggesting that plaintiff may have a contract claim directly against the Bank Board and FSLIC * * * [I]f the opinion was contemplating a possible contract action against the Bank Board or FSLIC, that part of the opinion which construes the FTCA's discretionary function exception should be deleted because it is *dicta* only.

Pet. for Rehearing at 14.

the Fifth Circuit's order is "interlocutory" at a far more fundamental level than the government would have this Court imagine.[8] Because it is still uncertain whether, and on what factual and legal bases, Gaubert's remaining claim will survive on remand and whether the district court will vitalize the Fifth Circuit's discretionary function exception discussion, this case falls squarely within "the Court's normal practice of denying interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissent); see also *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (lack of finality in judgment below may "of itself alone" constitute "sufficient ground for the denial of the application" except in extraordinary cases).[9]

II. The Negligent Day-To-Day Management Of A Thrift Falls Outside The Discretionary Function Exception.

Even apart from its interlocutory nature, the Fifth Circuit's discussion of the discretionary function exception does not meet this Court's standards for certiorari review because it correctly considered this Court's well-established principles in the context of the federal regulators' negligent day-to-day management of IASA.

The discretionary function exception "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect

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[8] Indeed, its petition relegates mention of the Fifth Circuit's remand order to a casual reference in two footnotes of its twenty-three pages. *Id.* at 11 n.7 & 23 n.14.

[9] This Court has long practiced restraint in its exercise of certiorari jurisdiction. "[T]his court should not issue a writ of certiorari to review the decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

certain governmental activities from exposure to suit by private individuals.'" *Varig, supra*, 467 U.S. at 808. In its most recent pronouncement, this Court has made clear that such a boundary can -- and must -- be drawn in *every* area of government regulation. "In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument * * * that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies." *Berkovitz, supra*, 108 S.Ct. at 1959-60.

In every case, then, a court must -- as the Fifth Circuit did here -- carefully analyze a complaint and determine whether, and which, actions fall on either side of the boundary. In conducting such an analysis "it is the nature of the conduct rather than the status of the actor that governs whether the discretionary function exception applies." *Varig, supra*, 467 U.S. at 813. As the Fifth Circuit acknowledged, there are two types of conduct -- that mandated by statute or regulation leaving no discretion and non-mandatory conduct that involves judgment other than public policy -- that fall outside the exception. *Pet.* at 11a-12a; see *Berkovitz, supra*, 108 S.Ct. at 1959, 1964.

In its discussion, the Fifth Circuit carefully considered these principles in the context of the facts presented. Federal statutes and regulations did not mandate how the federal agencies should manage IASA's day-to-day operations. Instead, the federal regulators were required to exercise an element of judgment. An element of judgment, however, does not automatically bring an action within the pale of the discretionary function exception. Instead, the judgment involved must be based on "social, economic, and political" policy considerations -- *i.e.*, the "governmental actions and decisions [must] be based on considerations of *public policy*." *Berkovitz, supra*, 108 S.Ct. 1959 (emphasis added). That is, "[t]he

[discretionary function] exception properly construed, * * * protects only governmental actions and decisions *based on considerations of public policy*." *Id.* (emphasis added).

The Fifth Circuit's discussion draws a principled distinction between non-mandatory actions that involved protected policy judgment (*e.g.*, the decision to merge Investex) and those that did not (*e.g.*, selection of consultants for routine loan evaluations). Although the federal regulators' decision to acquire control of IASA's day-to-day management might well have involved public policy considerations protected under the discretionary function exception, the actual management of IASA did not. The element of judgment involved in the type of day-to-day management alleged to have occurred at the then healthy IASA is qualitatively different from the "social, economic, and political policy" necessary to exempt an action from tort liability. Prudent management of a thrift requires business expertise and a combination of many technical skills, not governmental policy considerations. For example, decisions to manage an institution's assets, issue or call loans, raise or lower salaries, hire or dismiss consultants, and initiate a lawsuit involve technical and business expertise and do not implicate the legislative quality of protected actions.[10].

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[10] In footnote 4 of its opinion, the Fifth Circuit quoted the following passage from Judge Brown's concurrence in *Collins v. United States*, 783 F.2d 1225, 1233-34 (5th Cir. 1986):

> Every act of a rational being involves some choices -- speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of [sec.] 2680(a) must be applied with restraint if the Tort Claims Act is

(continued...)

Nor would it save the regulators' actions by arguing that they directed IASA's management based on public policy. In observing that *Indian Towing* "illuminates the scope of the discretionary function exception," this Court plainly stated that "maintain[ing] the lighthouse in good condition * * * did not involve any permissible exercise of policy judgment." *Berkovitz, supra*, 108 S.Ct. at 1959 n.3. Public policy considerations were no more involved in the management activities alleged at IASA than they were in operating a lighthouse or a flight tower."[11] *Indian Towing, supra*, 350 U.S. at 67-8 (lighthouse); *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (flight controllers) (affirming decision that "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently").

The government's petition mischaracterizes the Fifth Circuit's interlocutory discussion of the discretionary function exception. According to the government, the Fifth Circuit concluded that "any activity that is 'operational in nature' *necessarily* falls outside the scope of the [discretionary function] exception." *Pet.* at 11. While the Fifth Circuit occasionally used the shorthand phrase "operational" to describe the actions alleged in paras. 33-43 of Gaubert's amended complaint, it did not state that

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[10] (...continued)
to achieve the dual purpose which motivated its enactment. *Pet.* at 12a.

[11] The government contends that the Fifth Circuit's discussion of the discretionary function exception ignores *Varig*. *Pet.* at 15. To the contrary, the Fifth Circuit's discussion -- as explained above -- follows *Varig* fully. The proper analogy to *Varig* on the facts presented would be if the FAA had decided to operate an airplane (an immune policy decision) and then placed inexperienced pilots in the cockpit, gave them faulty maps and charts, and radioed them to fly a certain course, all of which caused the plane to crash (an actionable tort).

any actions conceivably characterized as "operational" are therefore actionable under the FTCA. To the contrary, the Fifth Circuit -- following this Court's analysis in *Berkovitz* -- first explored whether the alleged actions "'involve[d] any permissible exercise of policy judgment.'" *Pet.* at 11a. Only if the action was not "policy oriented" or did not permissibly involve policy judgment, did the court observe that it would fall outside the discretionary function exception. Over two-thirds of Gaubert's allegations -- many of which the compiaint also characterized as "operational" -- failed to pass the Fifth Circuit's exacting scrutiny. It is simply inaccurate for the government to state that the Fifth Circuit's interlocutory discussion of the exception "turns on" an "artificial distinction[] as that between * * * 'policy' and 'operational' activities." [12] *Pet.* at 12.

Distilled to its essence, the government's petition asks this Court to grant absolute immunity to federal officials involved in the thrift industry, even after those officials have assumed day-to-day management of a healthy thrift. Conspicuously absent from the government's petition is the articulation of any standard defining what FTCA actions would ever be actionable in a savings and loan context. Apparently, once in the regulatory framework, all actions would fit the discretionary function exception. It is this position -- rather than the Fifth Circuit's discussion -- which flatly contradicts this Court's precedent. *Berkovitz, supra*, 108 S.Ct. at 1959-60 ("[W]e intend specifically to reject the Government's argument * * * that the exception precludes liability for any and all acts arising out of [a] regulatory program[].")

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[12] While contending that its argument is not merely semantics, *Pet.* at 19, the government does no more than substitute its chosen words, "nature of the discretion exercised," for those used by the Fifth Circuit. This type of wordsmanship is not the proper basis for certiorari of an interlocutory order at the pleadings stage.

The government could not have made its claim to absolute immunity clearer than in its petition for rehearing to the Fifth Circuit:

> [t]here simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other. Rather, there is a continuing series of discretionary decisions many of which profoundly affect the management and direction of the institution. * * * *In this area of regulation, the mandate to regulate is equal to the power to control and influence the affairs of the association regulated* * * *.*

Pet. for Rehearing at 29 (emphasis added). Elsewhere the government stated: "The discretion to regulate in this context is the discretion to do so thoroughly, *even to the point of controlling and influencing the day-to-day operation of an association.*" *Id.* at 36 n.24 (emphasis added).

Granting federal thrift regulators absolute immunity elevates them to a status more protected than that of other agencies[13] and grants them greater protection in the exercise of their informal powers than they would have if they formally exercised their statutory authority. See *Hartford Insurance Co., supra*, 692 F. Supp. at 687-9 (government liable for FDIC receiver's negligent management of thrift's assets). Aside from the inherent

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[13] See, *e.g.*, *Berkovitz, supra*, 108 S. Ct. at 1963-64 (remanded for determination whether negligent release of vaccine involved permissible public policy judgment or technical expertise); *Indian Towing, supra*, 350 U.S. at 67-8 (lighthouse); *Rayonier Corp. v. U.S.*, 352 U.S. 315 (1957) (firefighters); *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (flight controllers).

inequity of the government's position, this point illustrates that the government's claim that a principled distinction cannot be drawn between public policy judgment and business judgment is untenable.

III. The Government's Petition Does Not Present A Substantial Or Unsettled Question Warranting Review.

Even ignoring the fact that the Fifth Circuit's discussion of the discretionary function exception is interlocutory and *dictum*, the government's petition does not present a substantial or unsettled question warranting review.

The Fifth Circuit's discussion would merely permit Gaubert to attempt to prove those allegations that charge the government with negligence in its day-to-day management of his thrift.[14] Those allegations set forth factual circumstances that reflect unprecedented actions taken by federal regulators. Such circumstances have not occurred and will not occur again.[15] Moreover, as with any other of the hundreds of cases decided under the discretionary function exception, the Fifth Circuit's discussion is highly fact specific and, aside from general principles applied, would be of extremely limited precedential value.

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[14] Again, this case is only at the initial pleadings stage. On remand, Gaubert will also have to establish causation, damages, and the other elements of a tort.

[15] The government raises the recent passage of FIRREA, the new banking law, somehow to bolster its argument. *Pet.* at 20. In reality, the new procedures of the law make it highly unlikely that the events at IASA will ever occur again.

The government incorrectly raises the specter that the Fifth Circuit's interlocutory discussion will "hobble and confine" federal efforts to address problems in the thrift industry."[16] First, the government assumes that Gaubert's remaining claim will survive the remaining jurisdictional obstacles awaiting him on the remand. Second, the Fifth Circuit's discussion affords federal officials virtually unbounded latitude in regulating thrift institutions. After carefully examining each allegation of Gaubert's complaint, the court observed that the vast majority fell within the discretionary function exception and were non-actionable. For example, the government will never have to answer for the folly of forcing a merger between Gaubert's then healthy thrift and a larger, failing thrift. Accordingly, the government's contention that the Fifth Circuit's discussion unduly limits regulatory discretion is without substance.

IV. The Fifth Circuit's Interlocutory Discussion Does Not Conflict With A Decision Of Any Other Circuit.

The government does not -- and cannot -- contend that the Fifth Circuit's discussion conflicts with a decision of any other circuit. Given the interlocutory nature of the case and the fact that the discussion of the discretionary function exception is *dictum*, it is too early to speak of a

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[16] In its petition, the Government raises the well-worn threat that the Fifth Circuit's interlocutory discussion of the discretionary function exception will open the floodgates to litigation. In the over seven months since the Fifth Circuit issued its interlocutory ruling, only one federal reported decision cited the discussion in a reported opinion. *Industrial Risk Insurers Assoc. v. New Orleans Public Service, Inc.*, __ F. Supp. __ (E.D.La. 1990) (1990 WL 36140). In that case, the court -- interpreting a state law provision analogous to the discretionary function exception -- cited the *Gaubert* discussion for the unremarkable proposition that "to be entitled to immunity, the decision must involve the weighing of economic, political and social policy concerns." *Id.* The court could just as easily have cited *Berkovitz*.

"conflict." A disagreement -- if such exists -- between an express holding in one case and interlocutory *dictum* in another does not present a conflict worthy of certiorari. Second, the government contends only that certain circuits "*appear* to reject the operational limitation," while others -- including the Fifth Circuit -- "*appear* to embrace it." *Pet.* at 18-19 (emphasis added). In fact, several of the cases cited have already been before this Court on a petition for certiorari which this Court denied.

The government's petition does not identify even apparent "conflicts." Indeed, fairly viewed, the Fifth Circuit's opinions, many heard by the same judges as here, tend to be more favorable to the government than those of other circuits.[17] Moreover, the government's criticism flatly contradicts its own statements about the Fifth Circuit's expertise in addressing the discretionary function exception. The government conceded below that the "Fifth Circuit has addressed the Discretionary Function Exception on several occasions since the Supreme Court's decision in *Varig*. In each of these cases, the Fifth Circuit followed the dictates of *Dalehite* and *Varig* and in all but one held that the district court lacked subject matter jurisdiction because of

[17] See, *e.g.*, *Lively v. United States*, 870 F.2d 296 (5th Cir. 1989) (no liability for failure to warn stevedores of asbestos dangers); (Gee, J.); *B&F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir. 1988) (no liability for negligent transportation of drug-running vessels) (Jones, J.); *Wysinger v. United States*, 784 F.2d 1252 (5th Cir. 1986) (no liability for negligent decision not to employ lifeguard); *Lindsey v. United States*, 778 F.2d 1143 (5th Cir. 1985) (no liability for negligent denial of patent application); *Jet Industries, Inc. v. U.S.*, 777 F.2d 303 (5th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) (no liability for negligent supervision of probationer); *Ford v. American Motors*, 770 F.2d 465 (5th Cir. 1985) (no liability for sale of used jeeps without safety warnings).

the Discretionary Function Exception." *March 17, 1988 Motion to Dismiss* at 28-9 (footnotes omitted)."[18]

The hundreds of decisions under the discretionary function exception are highly fact-specific and, as such, are rarely -- if ever -- dispositive of a later case. These decisions reflect the normal course of common-law development. Often both sides can refer to the same decision for support, each emphasizing the facts most similar to its own case. If the Fifth Circuit's discussion here were to become a holding, it would be no different. Even if there are in this case the discords about which the government complains, they may not remain after the facts are developed on remand. The government's request that this Court harmonize the Fifth Circuit's interlocutory discussion with other highly fact-specific cases is premature.

[18] Since 1984 alone, the Fifth Circuit has addressed the discretionary function exception in dozens of decisions. Since 1980, the members of the *Gaubert* panel had individually authored a total of seven opinions on the topic.

CONCLUSION

For the foregoing reasons, this Court should deny the government's petition for a writ of certiorari.

Respectfully submitted,

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